No. 4575.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Herman Landfield and J. W. Oliver,
Plaintiffs in Error,
vs.
The United States of America,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

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Statement of the Case.

The instant case is brought before this Honorable Court upon a writ of error from the United States District Court for the Southern District of California, Southern Division, by the plaintiffs in error, Herman Landfield and J. W. Oliver, the defendants below, hereinafter referred to as defendants.

An information in five counts was filed in the United States District Court hereinafter mentioned on the 17th day of October, 1924, charging the defendants

with violations of the National Prohibition Act. Counts one and two charged both defendants with unlawful sales of intoxicating liquor on the 28th and 30th days of July, 1924, respectively. The jury found the defendant Herman Landfield guilty as charged in both counts, and the defendant Oliver not guilty as charged in both counts. The court sentenced defendant Landfield to serve six months in the Orange county jail on each count, both sentences to run concurrently with each other and with that imposed on count five, which is hereinafter referred to.

Pursuant to the court's instructions, the court found both defendants not guilty as to the third count and no mention will be made herein as to said count.

Count four charged both defendants with the unlawful possession of three quarts and one pint of intoxicating liquor on or about the 29th day of August, 19...(the proof established the date as August 29, 1924); the jury found both defendants guilty as charged; the court imposed a fine of $1.00 upon each of said defendants on the fourth count.

Count five charged both defendants with maintaining a common nuisance on or about August 29, 1925, with violation of the National Prohibition Act; the jury found both defendants guilty as charged; and the court sentenced the defendant Landfield to one year in the Orange county jail, said sentence to run concurrently with that imposed on the first and second counts, and to pay a fine of $1000.00 and sentenced the defendant Oliver to six months in the Orange county jail on the fifth count.

The defendants assign thirteen specifications of error to the judgment of and proceedings had in the lower court. For the sake of convenience, for the purpose of expediting the consideration of its reply brief and to more clearly present its position, the defendant in error will treat each defendant and his specifications of error separately, and for the reason that most of the specifications of error relate to Landfield, the opening pages of this brief will be devoted to the defendant Landfield and his specifications of error which will be considered in the order in which they appear in his opening brief.

1.

The Verdict of the Jury Finding the Defendant Landfield Guilty as Charged in Counts One, Two, Four and Five of the Information and the Judgment of the Court Thereupon Were According to Law and Supported by the Evidence.

Defendant Landfield contends that each and every finding of the jury as against him was contrary to law and that the evidence was not sufficient to support the jury's verdict.

Each count of the information on which a verdict of guilty was returned against defendant Landfield will be discussed in the chronological order in which it appears in the information, and it is urged at the outset that the verdict of the jury is according to law and amply supported by the evidence.

I. The first count of the information charges the defendant Landfield with the unlawful sale of one bottle of intoxicating liquor to I. H. Corv, for $5.00, on the 28th day of July, 1924.

The said Cory, at the trial, testified that he was a federal prohibition agent; that he visited the Glendale Tavern on the 28th day of July, 1924, in company with his wife and Prohibition Agent Paul Hooke; that upon being seated at a table, he asked for the proprietor and in response to that request the defendant Landfield appeared [Tr. pp. 37-38]; that Landfield asked him what he wanted; that Cory answered, "Well, give us some gin fizzes." He (Landfield) said, "*I* don't serve any mixed up drinks at the table, but *I* will get you the makings." Cory further testified:

"So I went across the dance floor and went into a small room on the left hand side of the dance hall * * * and was gone a couple of minutes, then he came back and beckoned me from the middle of the dance hall. I then got up and walked over to him and he took me into this room. * * * and introduced me to Mr. Ellis. Mr. Ellis said, 'Oh, that is the man that wanted the gin,' and he gave me a White Rock bottle * * * and Mr. Ellis said, 'Here is the gin, here is the way *we* serve it.' I gave Mr. Ellis $5.00 * * *. Landfield did not actually take the money but he was there." [Tr. pp. 39-40.]

Agent Cory, on cross-examination, stated that on the 29th day of August, 1925, upon arresting Landfield, asked him where Ellis was. Landfield replied that he was not *working* there any more. [Tr. p. 51.]

The witness further testified that he drank two drinks out of the bottle; that he knew gin when he tasted it and that it contained more than one-half of one per cent of alcohol by volume. [Tr. p. 41.]

Mrs. Cory testified that she went to the Glendale Tavern on the evening of July 28, 1924, in company with Prohibition Agents Cory and Paul Hooke, and that she saw Landfield there; that Landfield told them *he* could not serve any drinks at the table but it was customary to get the bottle and to serve lemon juice and White Rock water in bottles, and that we could mix our drinks at the table; that he would see that we got a bottle of gin. Mr. Landfield left the table and very soon he came back and motioned to come out. When Mr. Cory returned he had the gin. [Tr. p. 53.]

Landfield took the stand in his defense and testified that he had been in charge of the Tavern for two days prior to July 28, 1924, and that he had not sold any liquor to Cory nor to anyone else. [Tr. pp. 64-69.]

So it is uncontradicted that the defendant Landfield on the 28th day of July, 1924, was the manager and in charge of the Glendale Tavern. He appeared when the proprietor was called and admitted he was in charge. It is contended by counsel that Landfield merely assisted the government agent in making the purchases, but it is respectfully urged that the evidence conclusively shows and was more than ample to justify the jury in finding that Landfield was guilty of making the sale charged in count one of the information.

"A man may, under certain circumstances, do a criminal act through the direct agency of another and the one who stands by and knowingly aids, counsels and abets the doing of a criminal act, becomes liable as principal."

Dukich v. U. S. (C. C. A., 9th Cir.), 296 Fed. 691.

See, also:

Heitler v. U. S. (C. C. A., 7th Cir.), 280 Fed. 703, 705;

Wigington v. U. S. (C. C. A., 4th Cir.), 296 Fed. 125.

There was evidence before the jury that Landfield was the manager of the cafe; that he described the manner in which the establishment served intoxicating drinks; that he would see that the essential ingredients, including gin, were obtained; that in his presence, in an ante-room in the establishment, a man named Ellis (who Landfield admitted worked there) sold the bottle of gin and made the statement, "This is the way *we* serve it." This evidene is more conclusive than that required to convict a defendant of sale done in the Dukich, Heitler and Wigington cases, *supra*.

II. The second count of the information charges the defendant Landfield with having unlawfully sold a bottle of intoxicating liquor on the 30th day of July, 1924, at the Glendale Tavern.

Prohibition Agent Ahlin testified that he was introduced to defendant Landfield at the Glendale Tavern on the 30th day of July, 1924. Upon being seated

with Agent Cory, Mrs. Cory and Agent Hooke at a table in the Glendale Tavern, Landfield was introduced as the proprietor. [Tr. p. 58.]

"Landfield called Mr. Ellis over. Mr. Landfield was present at the conversation between Mr. Ellis and myself. I told Mr. Landfield I wanted Scotch and Landfield said, 'Yes, give it to me.'" [Tr. p. 62.]

A short time after Ellis beckoned to the witness to come over to the little room off the dance floor and there sold him a bottle of Scotch whiskey for $5.00.

The circumstances of this sale are almost identical surrounding the one on the 28th day of July, and it is therefore respectfully submitted that the jury was justified in finding the defendant Landfield guilty of making the sale charged in count two of the information, the facts and circumstances falling within the rule in the Dukich, Heitler and Wigington cases, *supra*.

The fourth count of the information charges the defendant Landfield with the unlawful possession of three quarts and one pint of intoxicating liquor on the 29th day of August, 19...(the proof establishing the date as August 29, 1924). This liquor was seized at the Glendale Tavern. Landfield was present at the time in a managerial or proprietary capacity and had been such since two days before the 28th day of July, 1924. In view of all the facts and circumstances, the manner in which gin had been sold by the establishment on the 28th and 30th days of July, 1924, and the nature of the establishment, it is respectfully submitted that the evidence established beyond a reasonable doubt

that the liquor was unlawfully possessed and that the defendant Landfield knowingly aided and counseled in the unlawful possession thereof and the verdict of the jury in finding the defendant guilty of illegal possession was supported by the evidence.

IV. The defendant Landfield contends that there was not sufficient evidence to warrant the jury in finding him guilty of maintaining a nuisance, but, it will be noted, does not seriously urge this point; counsel merely cites the case of Muncy v. U. S., 289 Fed. 780, in support of said contention, which case is easily and readily distinguished from the case at bar. In the Muncy case, *supra,* the only evidence was one isolated case of the sale of one pint of liquor by a woman of the laboring class, made in her apartment. In the instant case, we have two sales, July 28, 1924, and July 30, 1924, made in a tavern or cafe by the proprietor or manager thereof and on the 29th day of August find the defendant in charge of the premises when a quart of intoxicating liquor was seized on the premises from guests on the place, raising the reasonable and logical inference, in view of the circumstances surrounding the sales to the prohibition agents, that the guests acquired the liquor on the 29th day of August in the same manner as did the prohibition agents on the previous occasions.

It has been recently held that where a defendant owned a building and knew that intoxicating liquor was being illegally kept and sold on the premises, the owner was guilty of maintaining a nuisance. (Dallas

v. U. S. (C. C. A., 8th Cir.), 4 Fed. (2nd) 201.) Here the defendant Landfield, though not the owner, but the manager, not only knew that intoxicating liquor was kept for sale, and sold, but actively engaged in the sale thereof himself. It is earnestly contended and urged that the evidence produced at the trial was ample upon which to base a verdict of guilty of nuisance as to the defendant Landfield.

2.

It is not seriously contended by the Government that the evidence was such to convict the defendant Oliver of possession, but it is urged that there was sufficient evidence to convict him of nuisance. It was shown that he was present on the 28th day of July when a sale of intoxicating liquor was made, and on the 29th day of August when the place was raided, acting in the capacity of a waiter, and that during the month of October, Prohibition Agent Ahlin purchased liquor from the defendant Oliver at the Glendale Tavern.

3.

It is contended in defendant's brief that the court erred in admitting hearsay evidence at the sale of intoxicating liquor on the 30th day of July, 1924, on the ground that the sale was not made in the presence of either of the defendants. It will be remembered that the defendant Oliver was acquitted as to this count, and therefore the contention is only applicable to the defendant Landfield. This evidence was with relation to the second sale on July 30th, 1924. The

prohibition agents on this occasion called for Landfield and asked him to sell them a bottle of Scotch whiskey. Landfield then called Mr. Ellis over and told Ellis to sell it to them. [Tr. p. 62.] The evidence also shows that the man Ellis was employed or working at the Glendale Tavern, as was hereinafter indicated. It is too well established to need citation that the acts of an agent within the scope of his authority are not hearsay as to his principal. However, in the case of West v. U. S. (C. C. A., 9th Cir.), 2 Fed. (2nd) 201-202, a case involving the question of sales of intoxicating liquor, made by an employee outside the presence of the principal or employer, it was held not to be hearsay as to the principal or employer.

4.

Defendants assign as error the introduction of testimony of the sale by Oliver to Agent Ahlin in October, on the ground that it was subsequent to the date named in the information charging the defendants with nuisance. The court admitted the evidence only in support of the nuisance count, and it is respectfully submitted that it is just as reasonable and competent to admit evidence tending to establish a nuisance *after* the time fixed in the information, as it is prior to the time fixed in the information.

Assuming for the sake of argument that this testimony was erroneously admitted (which we do not concede, however), it was not prejudicial to the defendant Landfield, for the reason that he was not connected with the sale and therefore it is not reasonable to in-

dulge in the inference that it was considered by the jury in its deliberations concerning his guilt or innocence, and for the further reason that it was harmless as to him, but for the principal reason that there was sufficient evidence before the jury without this testimony to convince the jury beyond reasonable doubt that he was guilty as charged in counts 1, 2, 5 and 6.

5.

Points 5 and 6 of defendants' brief that the trial court erred in not directing a verdict of not guilty as to both defendants, presents the same question as was presented in points 1 and 2 of defendants' brief and, as has heretofore been proved, points 1 and 2 of defendants' brief were not well taken, points 5 and 6 must also follow.

6.

Defendants assign as error the interrogation of defendant Landfield by the court. It is apparent, from an examination of the questions propounded to defendant Landfield by the court, that he could not possibly be prejudiced thereby, and it is respectfully submitted that the assignment, to say the least, is somewhat visionary.

7.

Defendants assign as error that no proper foundation was laid for the introduction of the following evidence:

I. The bottle of gin purchased on July 28, 1924;

II. The bottle of Scotch whiskey purchased on July 30, 1924;

III. The two bottles of gin and one bottle of Scotch whiskey on August 29, 1924.

Each prohibition agent in testifying as to the contents of the bottle testified that he knew either gin or whiskey when he tasted of it.

> "The statute does not require that the illegal contents of bottles be proved by chemical analysis."
>
> Smith v. U. S. (C. C. A., 4th Cir.), 2 Fed. (2nd) 715-716;
>
> Singer v. U. S. (C. C. A., 3rd Cir.), 278 Fed. 415, 418 (certiorari denied 42 Sup. Ct. 272).

The evidence shows that the test of each bottle was made immediately after the purchase or seizure thereof, and manifestly the issue is whether or not the bottle contained beverages pronounced to be unlawful by the state at the time illegal transactions took place. The evidence that the contents thereof were such as are prohibited by the statute at the time of the transactions is uncontradicted.

The argument of counsel for defendants that it must be shown that the contents of the bottles was in the same condition at the time of the trial that it was at the time of the sale or seizure thereof, is untenable, especially in view of the fact that the liquor was tested immediately upon coming into the hands of the agents. A failure on the part of the Govern-

ment to lay the foundation urged by the counsel for defendants, merely goes to the weight and not to the admissibility of the evidence. Counsel for defendant had the right, but did not avail himself thereof, to examine the witnesses on *voire dire,* and also to cross-examine the witnesses.

It is therefore respectfully submitted that the evidence was properly admitted and the weight to be given such testimony was one for the jury to determine.

8.

Counsel for defendants contend that the trial court erred in permitting witnesses to testify as to what occurred during a raid of the Glendale Tavern, and cite in support thereof excerpts from the testimony of prohibition agent I. H. Cory. Upon reading the entire testimony of agent Cory, concerning this raid, however, it clearly appears that no error was committed by the court. [Tr. pp. 45 to 51.]

9.

The contention of counsel and defendant that there was no proper foundation laid for the introduction of the two bottles of gin and one bottle of whiskey, seized on the 29th day of August, 1924, has heretofore been considered.

10.

The alleged errors assigned to the instructions of the court are without foundation when the entire charge of the court is considered. As to the alleged

error cited in paragraph 12 of defendants' brief, the attention of this honorable court is respectfully directed to page 74 of the transcript, wherein the trial court charged the jury that they were not bound by any expression of the opinion of the court with respect to the facts of the case. This is also true with respect to error alleged in paragraph 13 of defendants' brief.

Considering the instructions of the trial court to the jury as a whole, it is respectfully contended that no prejudicial error was committed.

It is respectfully submitted that the defendants were accorded a fair and impartial trial; that no prejudicial error was committed during the course thereof, and that the verdict of the jury and the judgment of the court were supported by the evidence and were according to law and should be affirmed.

Respectfully submitted,

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(Italics are ours.)